

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION FOUR**

**BOMBARDIER TRANSPORTATION
HOLDING USA INC.**

Employer

and

Case 04-RC-271607

**AMERICAN TRAIN DISPATCHERS
ASSOCIATION**

Petitioner

DECISION AND DIRECTION OF ELECTION

Bombardier Transportation Holding USA Inc. (the Employer) provides design, build, operation, and maintenance services to the New Jersey Transit's River LINE, a light rail system connecting the cities of Camden and Trenton in New Jersey. American Train Dispatchers Association (Petitioner) seeks to represent a bargaining unit of approximately eight rail traffic controllers (RTCs) working at the Employer's Camden facility. At issue is the supervisory status of the RTCs.¹ The Employer contends that RTCs are supervisors within the meaning of Section 2(11) of the National Labor Relations Act (the Act) based upon their purported authority to assign and responsibly direct other employees, while Petitioner maintains the RTCs are not statutory supervisors.

A hearing officer of the National Labor Relations Board (the Board) held a videoconference hearing in this matter on February 11, 2021,² and both parties filed post-hearing briefs. As explained below, based on the record, the briefs, and relevant Board law, I find that the Employer has not met its burden of establishing that the RTCs are supervisors within the meaning of the Act. The unit sought is otherwise appropriate and undisputed, and therefore I have directed an election in the petitioned-for unit. Because of the current state of the COVID-19 pandemic in Camden County, New Jersey where the facility is located, I have directed that the election take place by mail.

I. THE EMPLOYER'S OPERATIONS

The Employer is a party to a contract with New Jersey Transit whereby it operates and maintains the River LINE, which is predominately a single-track railroad with passing sidings that allow northbound and southbound trains to utilize the same track. There are two smaller sections of the line, one near Camden and the other near Trenton, that have double tracks.

¹ The parties stipulated that the RTCs at issue do not exercise the following supervisory indicia set forth in Section 2(11): hire, transfer, suspend, lay off, recall, promote, discharge, reward, discipline, and adjustment of grievances, and that they do not effectively recommend such actions.

² All dates are in 2021 unless otherwise indicated.

The Employer services the New Jersey Transit and the River LINE out of its facility in Camden. Site General Manager John Jamison heads the Camden operations. Beneath Jamison in the supervisory hierarchy is Superintendent of Transportation George Major, who directly supervises James McLaughlin, Assistant Superintendent of the Training Division; Sean McWilliams, Road Foreman of Engines; and Richard Kostrub, Train Master. Reporting to McLaughlin are the Supervisor of Train Operations (STO), Megan Krause, and the RTCs.

The Employer's light rail vehicle operators (operators) report to McWilliams and Kostrub.³ They transport passengers daily on the River LINE using the Employer's single unit light rail vehicles (LRVs or trains).⁴ The Employer operates LRVs on the River LINE 365 days a year, usually between 5:45 a.m. and 10 p.m. New Jersey Transit sets the route schedule, and operators bid on their desired daily itineraries every six months. Operator itineraries and manning tables⁵ are prepared and issued by McWilliams and Kostrub.

Typically, two RTCs work on day shift, two work on second shift, and one works on night shift. STO Krause works 2 p.m. to 10 p.m. Monday through Friday. Major and McLaughlin work Monday through Friday, 9 a.m. to 5 p.m. There are no supervisors or managers with supervisory authority over the RTCs at the facility from approximately 10 p.m. to 6:30 a.m. during the week, nor any on Saturdays, Sundays, or holidays. However, when no ranking supervisors or managers are present at the facility, an on-call supervisor can be reached at all times.⁶

II. THE SUPERVISORY ISSUE

A. RTC Duties

1. General responsibilities

RTCs are primarily tasked with the safe and efficient movement of LRVs on the River LINE. Working from the control room at the Camden facility, they monitor real-time data showing the position of every LRV. RTCs control the movement of LRVs on the River LINE by providing train authorizations to operators using radio and track signals and communication. Those signals indicate to operators whether they are cleared to move through a certain section

³ When fully staffed, the Employer employs approximately 35 operators. According to McLaughlin, the Employer does not presently employ a full complement of operators, but he did not specify how many operators are currently employed.

⁴ The Employer's operators are represented for purposes of collective bargaining by the Sheet Metal, Air, Rail and Transportation Union.

⁵ The manning tables identify which operators are scheduled to work on any given day and shift, and itineraries identify individual operators' daily schedule, including what train they will run and when they are scheduled for breaks.

⁶ RTCs are never scheduled as on-call supervisors.

of the River LINE or whether they must perform a different action, such as holding their position, moving into a passing siding, or returning to a station, among others.

As part of their responsibilities, RTCs must provide on-track protection for both track cars and individuals in the field who may occupy a certain section of the River LINE to perform track maintenance or testing. To do so, RTCs coordinate with the appropriate departments to ensure that no LRVs are authorized to enter a section of the River LINE that is being tested or maintained, while attempting to minimize schedule disruption as much as possible.⁷

RTCs are also tasked with coordinating nighttime freight operations with Conrail personnel. Conrail is a common carrier that has a contract with New Jersey Transit to operate freight trains on the River LINE from 10 p.m. to about 5:45 a.m., Sunday through Friday. According to Southern New Jersey Light Rail Transit System Operating Procedures, Plans, and Programs (Operating Procedures), freight and light rail transit must be kept apart by temporal separation, meaning the freight trains and LRVs cannot operate on the River LINE at the same time, aside from small specific sections of the track. The Operating Procedures delineate the responsibilities of the Employer's overnight RTC, as well as the Conrail controller, relating to the movement of freight trains on the River LINE, and permit the RTCs to hold a freight train on a freight-only siding if it becomes evident that the freight train will not clear the River LINE by 6 a.m. RTCs must ensure that Conrail freight trains have exited the River LINE before beginning LRV passenger service.

The STO works in the control room with the RTCs for the entirety of her shift and is responsible for the general oversight of the control center, recording any incidents that occur in a daily log, maintaining daily on-time performance reports, updating and issuing the daily bulletin order,⁸ fielding customer service calls, handling customer service complaints, and assisting the RTCs as needed. When she is not present at the facility, RTCs are responsible for issuing the daily bulletin order, maintaining the daily log, updating RTC worksheets, and recording where each operator is working. They are not, however, responsible for completing the daily performance reports.

2. Responding to River LINE incidents

A critical part of the RTCs' responsibilities is to appropriately and timely respond to River LINE incidents and service disruptions, such as LRV mechanical issues or failures, track

⁷ The record contains a disciplinary write-up for an RTC for failing to provide on-track protection by authorizing an LRV to enter a section of track being occupied by a track car operating under a permit. Because the RTC's actions could have resulted in serious harm to employees and the public, the RTC was given a "last-chance" warning.

⁸ According to the Operating Procedures, a bulletin order contains the information pertinent to the movement or safety of trains not otherwise contained within the LRT Operating Rules, Timetable Special Instructions, Safety Rules, Operating Procedures, Track Permits, or "Form Ds." Each bulletin order is in effect for a 24-hour period.

maintenance issues, and track blockages. When a service disruption occurs, it is incumbent upon an RTC to quickly assess the situation and decide how to mitigate the effect of the disruption so as to maintain timely service for passengers.

The Operating Procedures contains detailed instructions for responding to certain disruptions, as does the Southern New Jersey Light Rail Transit System Operating Rules (Operating Rules), two manuals that govern the RTCs in the performance of their work. According to the Operating Procedures, if an LRV or track car experiences a breakdown, the operator must first report the situation to an RTC and attempt to determine the nature and cause of the breakdown. The RTC will then dispatch a rescue vehicle or LRV and begin the process of determining how service can be maintained.

If a service disruption is caused by a track obstruction or an otherwise unsafe track condition, the Operating Procedures provides detailed instructions for maintaining service. The RTC will need to order a “bus bridge”—a bus to transport LRV passengers around a track blockage. Next, the RTC must contact the New Jersey Transit bus dispatcher and request the bus, providing the dispatcher with as much information as possible. The RTC will determine the number of busses needed based on the time of day. According to the Operating Procedures, if the disruption is during peak hours, the RTC should request a minimum of two busses and increase that number if passenger volume is higher than normal; during non-peak hours, only one bus should be requested. Lastly, the Operating Procedures directs RTCs to inform all trains approaching the stations where the bus bridge has been established to discharge passengers at those stations.

The Operating Procedures also provides instruction for other service disruptions. RTCs can look to the Operating Procedures for instruction when dealing with track switch failures, track signal failures, signal system failures, automobiles on the track, and trespassers. The manual also provides detailed guidance for other incidents, some that might require police presence, including vandalism, trespassers, emergency evacuations, and bomb threats, among others. Furthermore, to limit disruption when a train is removed from service, the Operating Procedures directs RTCs or the STO to use double units—two trains coupled together—on the subsequent train whenever possible to handle additional passenger volume. An RTC testified that while she may not have an opportunity to consult the Operating Procedures or other manuals during an immediate response to a track incident, the decisions she makes when responding to a service disruption are guided by her years of service and past reading of the manuals.

The record contains several examples of RTCs reacting to service disruptions. On December 21, 2020, an operator called the control room to report that his LRV kept shutting down. In response, the RTC told him to discharge his passengers and to bring the LRV back to the yard for service. Then, the RTC reached out to another operator and instructed him to cancel his express train and pick up the passengers that had disembarked from the malfunctioning LRV. Finally, the RTC cancelled the malfunctioning LRV’s return trip.

In another example, on February 6 an operator called the control room to inform the RTC that there was a fight among passengers on his LRV, and his train was being held at the Cinnaminson, New Jersey train station by the police as they investigated. In response, the RTC diverted one train before calling Assistant Superintendent McLaughlin to apprise him of the situation. McLaughlin instructed the RTC to disseminate a text message alert informing recipients of the delay. Due to the police refusing to allow train activity through the Cinnaminson station while the investigation was ongoing, the RTC was also forced to “tie down” a northbound train and a southbound train that were at the nearest stations. Additionally, the RTC rerouted several different trains from their scheduled routes.

In a third example, an RTC was forced to tie down an LRV because a Conrail freight train was late exiting the track. The RTC stopped the operator and did not allow him to resume movement until the freight train was cleared from the River LINE.

3. RTC involvement in determining operator schedules and shift coverage

Certain decisions made by RTCs may necessarily impact the operators. If an LRV is removed from service, the operator is either reassigned to another LRV or brought back to the yard. When the RTC made the decision to bring the malfunctioning LRV back to the yard in the example discussed above, the operator was required to return to the yard and perform service there as needed and as required by his bid job.

In another example, after the LRV held by the police was cleared to move, the LRV was brought back to the yard instead of finishing the assigned itinerary. In order to limit the service impact of that decision, and instead of cancelling the remaining portion of the itinerary of the LRV, the RTC instructed an operator, who was already at the yard performing routine service, to take a train from Camden and express it (run without stops) until it effectively caught up to the scheduled itinerary of the LRV taken out of service. Thus, in mitigating the effects of the service disruption, the RTC altered the schedule of two operators.

The record contains another example of an RTC altering the schedules of two operators. An operator called the control room to report to the RTC that he overslept and would not make it to the facility in time to operate his first train. In response, the RTC asked the operator who was scheduled to run the next scheduled train to move up his shift and run the earlier train. That operator agreed, so the RTC effectively swapped, on a one-time basis, the schedules for the two operators.

Lastly, RTCs are tasked with assisting the Train Master with arranging coverage for unscheduled operator absences when the Train Master and Road Foreman are not present at the facility. When an operator reports that he or she will miss a scheduled shift and the Train Master or Road Foreman are not available, the RTC is expected first to try and call in for overtime an operator who is not scheduled to work. If that does not succeed, the RTC will ask either the Train Master or Road Foreman to assist in providing service. As a last resort, the RTCs are expected to rearrange operators who are already at the facility to provide coverage

as best as they can. According to one RTC, where immediate coverage is necessary, RTCs are instructed to retrieve a call list in the Train Master's office that specifies which off-duty operators should be contacted .

B. Analysis

1. Section 2(11) Standard

The Act expressly excludes supervisors from its protection. Section 2(11) of the Act defines a supervisor as:

any individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward or discipline other employees, or responsibly direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment.

The three requirements to establish supervisory status are that the putative supervisor possesses one or more of the above supervisory functions; the putative supervisor uses independent, rather than routine or clerical, judgment in exercising that authority; and the putative supervisor holds that authority in the interest of the Employer. *NLRB v. Kentucky River Community Care, Inc.*, 532 U.S. 706, 712-713 (2001) (citing *NLRB v Health Care & Retirement Corp. of America*, 511 U.S. 571, 573-74 (1994)).

Supervisory status may be shown if the alleged supervisor has the authority either to perform a supervisory function or to effectively recommend the same. The statutory definition of a supervisor is read in the disjunctive. Possession of any one of the enumerated powers, if accompanied by independent judgment and exercised in the interest of the employer, is sufficient to confer supervisory status. *Kentucky River*, 532 U.S. at 713. Supervisory status may likewise be established if the individual in question has the authority to effectively recommend one of the powers, but effective recommendation requires the absence of an independent investigation by superiors and not simply that the recommendation be followed. *Children's Farm Home*, 324 NLRB 61, 65 (1997).

If such authority is used sporadically, the putative supervisor will not be deemed a statutory supervisor. *Coral Harbor Rehabilitation and Nursing Center*, 366 NLRB No. 75, slip op. at 17 (2018). The supervisor has to at least act or effectively recommend such action "without control of others and form an opinion or evaluation by discerning and comparing data." *Oakwood Healthcare, Inc.*, 348 NLRB 686, 692-693 (2006). Judgment is not independent when the putative supervisor follows detailed instructions (e.g., policies, rules, collective-bargaining agreement requirements). *Id.* at 693. To be independent, "the judgment must involve a degree of discretion that rises above the 'routine or clerical.'" *Id.* at 693, citing *J.C. Brock Corp.*, 314 NLRB 157, 158 (1994) (quoting *Bowne of Houston*, 280 NLRB 1222, 1223 (1986), finding that "the exercise of

some ‘supervisory authority’ in a routine, clerical, perfunctory, or sporadic manner does not confer supervisory status”). If a choice is obvious, the judgment is not independent. *Oakwood Healthcare*, 348 NLRB at 693. The Board has an obligation not to construe the statutory language too broadly because the individual found to be a supervisor is denied the employee rights that are protected under the Act. *Avante at Wilson, Inc.*, 348 NLRB 1056, 1057 (2006); *Oakwood Healthcare, Inc.*, supra at 687 (2006).

In *Oakwood Healthcare*, the Board explained “responsible direction,” as follows: “If a person on the shop floor has ‘men under him,’ and if that person decides ‘what job shall be undertaken next or who shall do it,’ that person is a supervisor, provided that the direction is both ‘responsible’ . . . and carried out with independent judgment.” “Responsible direction,” in contrast to “assignment,” can involve the delegation of discrete tasks as opposed to overall duties. *Id.* at 690-692. But, an individual will be found to have the authority to responsibly direct other employees only if the individual is *accountable* for the performance of the tasks by the other employee. Accountability means that the employer has delegated to the putative supervisor the authority to direct the work and the authority to take corrective action if necessary, and the putative supervisor faces the prospect of adverse consequences if the employees under his or her command fail to perform their tasks correctly. *Ibid.* See also *Community Education Centers, Inc.*, 360 NLRB No. 17, slip op. at 1 (2014).

Furthermore, as defined in *Oakwood Healthcare, Inc.*, at 689-690, the term “assign” refers to the “act of designating an employee to a place (such as a location, department or wing), appointing an employee to a time (such as a shift or overtime period) or giving significant overall duties, i.e., tasks, to an employee.” Assignment or responsible direction will, as noted above, produce a finding of supervisory status only if the exercise of independent judgment is involved. Independent judgment will be found where the alleged supervisor acts free from the control of others, is required to form an opinion by discerning and comparing data, and makes a decision not dictated by circumstances or company policy. *Oakwood Healthcare*, supra at 693; *PPG Aerospace Industries, Inc.*, 353 NLRB 223, 223 (2008). Independent judgment requires that the decision “rise above the merely routine or clerical.” *Oakwood Healthcare*, supra at 693.

Lastly, the party asserting supervisory status has the burden of proving supervisory authority and must establish it by a preponderance of the evidence. *Kentucky River*, 532 U.S. at 711; *Oakwood Healthcare, Inc.*, 348 NLRB at 687. The lack of evidence is construed against the party asserting supervisory status. *Dean & DeLuca New York, Inc.*, 338 NLRB 1046, 1047-1048 (2003). In addition, purely conclusory evidence is insufficient to establish supervisory status. *Golden Crest Healthcare Center*, 348 NLRB 727, 731 (2006); *Volair Contractors, Inc.*, 341 NLRB 673, 675 (2004). Similarly, supervisory status is not demonstrated when the evidence is in conflict or inconclusive. *Entergy Mississippi, Inc.*, 367 NLRB No. 109, slip op. at 2-3 (2019).

2. Section 2(11) Factors

i. Assignment

(1) Assigning employees to a particular location

The Employer first argues that RTCs use independent judgment to assign operators to specific places in the course of responding to service disruptions. According to the Employer, evidence to support this contention can be found in the situations described earlier in this Decision. Specifically, when the RTCs needed to respond to the disruptions caused by the malfunctioning LRV, the police-related train incident, and the Conrail freight train disruption, the RTCs used independent judgment in choosing how to reroute trains, and the operators driving those trains, in order to limit passenger service delays.

The Employer likens the instant case to the facts in *Entergy Mississippi, Inc.*, 367 NLRB No 109 (2019). In that case, concluding that power utility dispatchers were supervisors within the meaning of Section 2(11), the Board found that the “dispatchers use independent judgment in assigning employees to places by prioritizing outages, determining how many employees should be sent to address a given outage, and deciding to reassign field employees or hold them over from their regular shift or to summon on-call employees to work.” *Id.* at 4. Critical to the Board’s finding that the dispatchers use independent judgment was its determination that there were “no standard operating procedures or rules for dispatchers to follow when prioritizing outages.” *Ibid.* Thus, “the dispatchers make complex decisions regarding prioritization of outages and the number of employees to dispatch to effect repairs based on their own judgment, guided by a wide range of discretionary factors.” *Ibid.* Finally, the Board found that “the dispatchers’ decisions regarding outage prioritization and reassigning field employees necessarily result in the dispatchers sending particular field employees to particular places in multiple outage situations. *Id.* at 5.⁹

Entergy Mississippi is distinguishable from the instant case. Unlike in *Entergy Mississippi*, the record here does not establish that RTCs have the authority to assign operators to locations other than their assigned work locations. Operators bid on their desired schedules, and the Train Master and Road Foreman create six-month schedules based on those bids. In the course of responding to service disruptions, RTCs have no authority beyond instructing operators to, for example, hold their position, proceed in a different direction, or return to the yard. RTCs cannot instruct operators to perform train operations on a different transit line, or require operators to perform altogether different work such as driving a bus or operating a vehicle other than an LRV. If an RTC must make a change to the movement of a particular train, that change remains within the context of the operator driving an LRV on the River LINE. The occasional shifting between the train and the yard does not rise near the level of assigning employees to locations as is present in *Entergy Mississippi*.

Furthermore, when responding to service disruptions, RTCs are required to find solutions that limit passenger delays and keep all LRVs in service if possible. In other words, in determining the proper course of action when responding to service disruptions, RTCs are asked to find a solution that continues the operators and their LRVs on their scheduled routes, routes that are set

⁹ In the cited *Entergy Mississippi* decision, the Board applied “the law of the case” following a remand by the United States Court of Appeals for the Fifth Circuit.

by the New Jersey Transit and bid on by the operators. Whereas the dispatchers in *Entergy Mississippi* were required to redirect field employees to various work locations, RTCs are focused on keeping operators on schedule without changing their itineraries.

Moreover, in *Entergy Mississippi*, there were no operating procedures or rules for dispatchers when responding to outages. In contrast, the Operating Procedures and Operating Rules contain detailed instructions for RTCs when responding to certain service disruptions. Certainly, RTCs need to use some discretion in dealing with emergencies or unexpected situations, and the Operating Procedures and Operating Rules do not cover every conceivable emergency in detail. They do, however, provide a number of directives that, according to witness testimony, are followed by RTCs.

Indeed, two of the three primary examples of RTCs using independent judgment cited by the Employer were handled in a manner consistent with the Operating Procedures. Thus, the RTC took the malfunctioning LRV out of service, annulled that train's return route, and instructed another operator train to end his train's express service and pick up the passengers who were forced to disembark from the malfunctioning train. According to the Operating Procedures, in the case of a breakdown, another LRV should be directed to the malfunctioning LRV as a rescue vehicle while the RTC determines how to maintain service. In this example, consistent with the Operating Procedures, the RTC directed the malfunctioning train to return to the yard and redirected another LRV to pick up the stranded passengers. Additionally, the RTC who tied down an LRV to avoid Conrail freight train handled that situation as directed in the Operating Procedures,¹⁰ not by using independent judgment.

I further find that the RTC's response to the service disruption due to police activity did not involve the use of independent judgment. The police, in the course of investigating potential criminal activity by train passengers, refused to allow train traffic through the station. Consequently, the RTC was limited in how to respond to the situation. The RTC used discretion in determining to reroute trains, instead of calling for a bus bridge, as well as in putting a new train in service to effectively take the remaining itinerary of the train out of service. However, the decision made by the RTC did not, in effect, do anything more than to move trains on the River LINE that were already running, or scheduled to run, on that same line. The ultimate decision was not, as in *Entergy Mississippi*, how to prioritize differing emergencies or move employees from one location to another. Instead, the decision involved how to keep the LRVs moving on the River LINE with as little disruption to customers as possible. This decision was routine in the context

¹⁰ The Employer also cited to an RTC's testimony that she had encountered thousands of service disruptions in her career related to road crossing issues as evidence that RTCs continuously use independent judgment in the course of their work. However, Section 138(c) of the Operating Rules very clearly defines how RTCs must respond to a malfunctioning highway grade crossing.

of the work regularly performed by RTCs and is insufficient to show the use of independent judgment.¹¹

In the instant case, operators' schedules are governed by their collective-bargaining agreement procedures and set by the Train Master and Road Foreman. The route schedules are set by New Jersey Transit. The Operating Procedures and Operating Rules, which the Employer requires its RTCs to follow, provide detailed instructions for many of the situations handled by RTCs. Thus, I find that the limited examples of RTCs redirecting trains to account for service disruptions, track maintenance, or track testing are either guided by the Operating Procedures and Operating Rules, or involve routine decisions that do not involve the use of independent judgment.

(2) Assigning employees to a particular time

The Employer also argues that RTCs have the authority to assign employees to a particular time. In support, the Employer relies, in part, on the RTC who switched two operators' schedules when one of them overslept. The Employer also relies on evidence that operators are involved in covering unscheduled absences and potentially holding operators past their scheduled shift if operational needs require it.

I do not find that the RTC who switched two operators' schedules on one occasion used independent judgment. The transcript of the audio recording detailing the RTC's conversations with the two operators shows that the RTC merely asked if the second operator would be willing to move up his shift to account for the potential absence of the first operator. There is no evidence that the RTC would have, or could have, forced the operators to switch. In fact, in another example where an operator asked an RTC to permit a schedule shift with another operator, the RTC emailed the Train Master and Road Foreman, apprised them of the situation, and specifically stated that she was passing the message along since she did not have permission to grant the schedule change.

¹¹ In *Alternate Concepts, Inc.*, 358 NLRB 292 (2012) the Board concluded that line controllers, responsible for ensuring the safe movement and efficiency of light rail transit trains, are not supervisors within the meaning of Section 2(11) of the Act, where those controllers do not: assign light rail train operators significant overall duties; direct train operators on how to operate the trains; nor schedule the train operators. In that case, it was highly significant that even though line controllers had the authority to make decisions that necessarily impacted the working conditions of train operators, such as notifying operators of emergencies or track work locations, those areas of authority were circumscribed by employer policies or were otherwise routine in nature. Like the disputed individuals in *Alternate Concepts*, the RTCs do not schedule operators, do not direct operators on how to drive the LRVs, and use reference manuals which contain detailed instructions for handling many situations faced by RTCs.

I do not rely on *Alternative Concepts* in finding that RTCs are not statutory supervisors, as it was invalidated by the Supreme Court's ruling in *NLRB v. Noel Canning*, 573 U.S. 513 (2014), but merely note the substantive similarities between that decision and the instant matter. See *Peacock Productions of NBC Universal Media, LLC*, 364 NLRB No. 4 (2016).

The Board has held that the scheduling of overtime, if carried out within fixed parameters established by management, is routine and does not indicate supervisory status. *Dico Tire, Inc.*, 330 NLRB 1252 (2000). Here, the evidence indicates that operators are left detailed instructions by the Train Master or the Road Foreman as to how to fill unscheduled operator absences. While the record is not clear as to whether an RTC can require an operator to cover an unscheduled absence, even if the RTC had that authority, it would derive from detailed parameters established by the Train Master or the Road Foreman. Consequently, I find that any RTC involvement in covering unscheduled operator absences, even if it results in overtime, does not involve the use of independent judgment.

Moreover, there is insufficient evidence to show that RTCs use independent judgment in requiring operators to stay past the end of their scheduled shifts. An RTC testified that in 2019, she emailed an operator's supervisor to report that the operator punched out later than usual that night because the operator was helping with vehicle moves in the yard and required inspections. There is no evidence, however, to determine who requested or required the operator to stay late, or how the RTC was involved in that decision, other than reporting it to the Train Master and Road Foreman. In another instance where an operator was asked to clock in early, the operator was already present at the facility, and the RTC's request to clock in early was made to account for a service disruption. This was simply a routine request, with no evidence that the RTC could have required the operator to begin his shift early.

Based on the foregoing, I find that the Employer has failed to meet its burden in showing that RTCs have the authority to assign other employees to specific times.

(3) Assigning employees to significant overall duties

The Employer also argues that RTCs have the authority to assign operators to significant overall duties as defined by the Board in *Oakwood*, supra. To support its assertion, the Employer relies on an example of an RTC asking an operator to perform his required yard work duties, duties that are outlined in the operators' bid job. In an email to the Train Master, STO, and Assistant Superintendent, the RTC recounted how the operator refused to perform his required yard duties. and stated that she explained to the operator that when he is at the facility and clocked in, if an RTC gives him instructions, his job is to follow them.

I find that this example falls far short of showing that RTCs assign significant overall duties to operators. Thus, the RTC simply asked the operator to perform yard work squarely within the requirements of the operator's bid job. This was a reminder to perform the job duties required by his job, not an assignment of significant overall duties requiring the use of independent judgment.

In sum, and for the foregoing reasons, I find that the Employer has failed to meet its burden to show that RTCs have the authority to assign work to other employees within the meaning of Section 2(11) of the Act.

ii. Responsibly Direct

To support its argument that RTCs have the authority to responsibly direct other employees, the Employer principally relies on the example cited above, the RTC asking an operator to perform his required yard duties, and the instance where an RTC was disciplined for allowing an LRV to move into a section of track occupied by a track car. According to the Employer, both examples establish that RTCs direct the work of operators, and the second example specifically establishes that RTCs can be disciplined for providing incorrect instructions to operators. I do not find the Employer's argument to be persuasive.

Accountability means that the employer has delegated to the putative supervisor the authority to direct the work and to take corrective action if necessary, and the putative supervisor faces the prospect of adverse consequences if the employees under his or her command fail to perform their tasks correctly. *Ibid.* See also *Community Education Centers, Inc.*, 360 NLRB No. 17, slip op. at 1 (2014). In the first example, the RTC told the operator to perform the yard duties within his bid job description, and when he would not do so, she simply reported his conduct to her superiors. There is no evidence that the RTC had the authority to take corrective action, such as send the operator home for insubordination, or that she faced the prospect of adverse consequences for the operator's inadequate performance.

The second example is similarly unpersuasive. The RTC was not disciplined because of the poor performance of an operator or the individual operating the track car, but for her own conduct of permitting both vehicles to use the same track space. This discipline is not an indication that she has the authority to responsibly direct others. Based on the foregoing, and the record as a whole, the Employer has failed to meet its burden in regard to demonstrating that RTCs have the authority to responsibly direct the work of other employees.

The Employer argues that the record contains examples of secondary indicia, including a comparatively high compensation rate for RTCs and their status as the highest-ranking official at the facility on nights, weekends, and holidays. However, absent primary indicia, secondary indicia are insufficient to confer supervisory status. See *Pacific Coast MS*, 355 NLRB 1422, 1423 n. 13 (2010), *Training School at Vineland*, 332 NLRB 1412, 1412–1413 n. 3 (2000). I therefore conclude that the Employer has failed to sustain its burden to demonstrate that the RTCs are supervisors, and find that a unit of RTCs is appropriate for purposes of collective bargaining, and direct an election, the details of which are below.

III. METHOD OF ELECTION

At the hearing, both parties expressed a preference for a manual election. However, I find that the current pandemic conditions in Camden County, New Jersey, where a manual election would be held, warrant directing a mail-ballot election.

The Board's longstanding policy is that elections should, as a rule, be conducted manually. See National Labor Relations Board Casehandling Manual (Part Two) Representation

Proceedings, Sec. 11301.2; *San Diego Gas and Electric*, 325 NLRB 1143, 1145 (1998). However, the Board has stated that a Regional Director may reasonably conclude, based on circumstances tending to make voting in a manual election problematic, to conduct an election by mail ballot. *Id.* The Board addressed a few specific situations, including where voters are “scattered” over a wide geographic area, “scattered” in time due to employee schedules, in strike situations, or other unspecified extraordinary circumstances. *San Diego Gas and Electric*, *supra*.

Congress has entrusted the Board with a wide degree of discretion in establishing the procedure and safeguards necessary to ensure the fair and free choice of bargaining representatives, and the Board in turn has delegated the discretion to determine the arrangements for an election to Regional Directors. *San Diego Gas and Electric*, *supra*; *Halliburton Services*, 265 NLRB 1154 (1982); *National Van Lines*, 120 NLRB 1343, 1346 (1958);. This discretion includes the ability to direct a mail-ballot election where appropriate. *San Diego Gas and Electric*, at 1144-1145. The Regional Director’s decision should not be overturned unless a clear abuse of discretion is shown. *National Van Lines* at 1346.

During the COVID-19 pandemic, the risk of infection associated with gatherings and in-person activities has impacted the way the Board conducts its elections, leading to an increase in the number of elections conducted by mail. After a brief pause in elections early in the pandemic, the Board resumed conducting elections in April 2020, with many Regional Directors directing primarily mail-ballot elections in light of the extraordinary circumstances presented by the COVID-19 pandemic. To assist Regional Directors in safely conducting elections, on July 6 the General Counsel issued a memorandum titled “Suggested Manual Election Protocols,” *Memorandum GC 20-10*, setting forth detailed suggested safety procedures.

Thereafter, in *Aspirus Keweenaw*, 370 NLRB No. 45 (Nov. 9, 2020), the Board addressed how Regional Directors should assess the risks associated with the pandemic when considering the appropriate method of election. In doing so, the Board reaffirmed its longstanding policy favoring manual elections, but outlined six situations that suggest the propriety of mail ballots. Specifically, when one or more of the following situations is present, a Regional Director should consider directing a mail-ballot election:

1. The Agency office tasked with conducting the election is operating under “mandatory telework” status;
2. Either the 14-day trend in number of new confirmed cases of COVID-19 in the county where the facility is located is increasing, or the 14-day testing positivity rate in the county where the facility is located is 5 percent or higher;
3. The proposed manual election site cannot be established in a way that avoids violating mandatory state or local health orders relating to maximum gathering size;

4. The Employer fails or refuses to commit to abide by *GC Memo 20-10*, Suggested Manual Election Protocols;
5. There is a current COVID-19 outbreak at the facility or the employer refuses to disclose and certify its current status; or
6. Other similarly compelling circumstances.

After a review of the current state of the COVID-19 virus in New Jersey and Camden County, where the Employer's facility is located, I have determined that a mail-ballot election is the appropriate option based on the second factor.

The first *Aspirus Keweenaw* factor does not favor a mail ballot - the Regional Office is not currently in mandatory telework status. Regarding the third factor, I find no state, county or local measure as to maximum gathering size would be implicated by a manual election. With respect to the fourth factor, the Employer's commitments regarding precautions for a manual election are generally consistent with *GC Memo 20-10*, and as to the fifth factor, there is no basis to find a COVID-19 outbreak is ongoing at the Employer's facility.

In addressing the second factor – whether the 14-day trend in the number of new confirmed cases of COVID-19 in the county where the facility is located is increasing, or whether the 14-day testing positivity rate in the county where the facility is located is 5 percent or higher – the Board directs Regional Directors to utilize the data published by Johns Hopkins University, or data from official state or local government sources. Where county level data are not available, Regional Directors should look to state level data.

The Johns Hopkins University COVID-19 Status Report for Camden County, New Jersey on March 18 reports a 14-day increase from 106 to 207 cases.¹² Neither New Jersey nor Camden County publish a 14-day testing positivity rate, however, the federal Centers for Disease Control and Prevention (CDC) maintains county-level 7-day average positivity rate data. According to the CDC's most-recent Integrated County View data, Camden County's positivity rate is currently 5.46 percent.¹³

The Board has also directed that when state and local positivity rate data is not available, Regional Directors may also look to state-level data. On March 18, the 14-day positivity rate in New Jersey was 8.7 percent.¹⁴

¹² <https://bao.arcgis.com/covid-19/jhu/county/34007.html>

¹³ <https://covid.cdc.gov/covid-data-tracker/#county-view>

¹⁴ <https://coronavirus.jhu.edu/region/us/new-jersey>

Thus, pursuant to the second *Aspirus Keweenaw* factor, I have decided that a manual election at this time would be potentially unsafe, and I have therefore directed a mail-ballot election.

CONCLUSION

Based upon the entire record in this matter and in accordance with the discussion above, I conclude and find as follows:

1. The rulings made at the hearing are free from prejudicial error and are hereby affirmed.
2. The Employer is engaged in commerce within the meaning of the Act, as stipulated by the parties, and it will effectuate the purposes of the Act to assert jurisdiction.
3. The parties stipulated, and I find, that Petitioner is a labor organization within the meaning of Section 2(5) of the Act.
4. The parties stipulated, and I find, that that there is no collective-bargaining agreement covering any of the employees included in the appropriate unit, and there is no contract bar or other bar to an election.
5. A question affecting commerce exists concerning the representation of certain employees of the Employer within the meaning of Section 9(c)(1) and Section 2(6) and (7) of the Act.
6. The following employees of the Employer constitutes a unit appropriate for the purpose of collective bargaining within the meaning of Section 9(b) of the Act:

Included: All full-time and regular part-time employees who perform rail traffic controller services for the Employer at its 700 Beideman Ave., Camden, New Jersey facility.

Excluding: All other employees, office clerical employees, confidential employees, professional employees, managerial employees, guards and supervisors as defined by the Act.

DIRECTION OF ELECTION

The National Labor Relations Board will conduct a secret ballot election among the employees in the unit found appropriate above. Employees will vote whether or not they wish to be represented for purposes of collective bargaining by American Train Dispatchers Association.

A. Election Details

The mail ballots will be mailed to employees employed in the appropriate collective-bargaining unit on Friday March 26, 2021. Voters must return their mail ballots so that they will be received by close of business on Friday, April 16, 2021. The mail ballots will be counted on Thursday, April 22, 2021 at a time and location to be determined, either in person or otherwise, after consultation with the parties. If any eligible voter does not receive a mail ballot or otherwise requires a duplicate mail ballot kit, he or she should contact the Region Four office no later than 5:00 pm on Friday, April 2, 2021 in order to arrange for another mail ballot kit to be sent to that employee.

If any eligible voter does not receive a mail ballot or otherwise requires a duplicate mail ballot kit, he or she should contact the Region Four office no later than 5:00 pm on Friday, April 2, 2021 in order to arrange for another mail ballot kit to be sent to that employee.

B. Voting Eligibility

Eligible to vote are those in the unit who were employed during the payroll period ending March 19, 2021, including employees who did not work during that period because they were ill, on vacation, or temporarily laid off.

Employees engaged in an economic strike, who have retained their status as strikers and who have not been permanently replaced, are also eligible to vote. In addition, in an economic strike that commenced less than 12 months before the election date, employees engaged in such strike who have retained their status as strikers but who have been permanently replaced, as well as their replacements, are eligible to vote. Unit employees in the military services of the United States may vote if they appear in person at the polls.

Ineligible to vote are (1) employees who have quit or been discharged for cause since the designated payroll period; (2) striking employees who have been discharged for cause since the strike began and who have not been rehired or reinstated before the election date; and (3) employees who are engaged in an economic strike that began more than 12 months before the election date and who have been permanently replaced.

C. Voter List

As required by Section 102.67(l) of the Board's Rules and Regulations, the Employer must provide the Regional Director and parties named in this decision a list of the full names, work locations, shifts, job classifications, and contact information (including home addresses, available personal email addresses, and available home and personal cell telephone numbers) of all eligible voters.

To be timely filed and served, the list must be *received* by the Regional Director and the parties by March 24, 2021. The list must be accompanied by a certificate of service showing service on all parties. **The Region will not serve the voter list.**¹⁵

Unless the Employer certifies that it does not possess the capacity to produce the list in the required form, the list must be provided in a table in a Microsoft Word file (.doc or docx) or a file that is compatible with Microsoft Word (.doc or docx). The first column of the list must begin with each employee's last name and the list must be alphabetized (overall or by department) by last name. Because the list will be used during the election, the font size of the list must be the equivalent of Times New Roman 10 or larger. That font does not need to be used but the font must be that size or larger. A sample, optional form for the list is provided on the NLRB website at www.nlr.gov/what-we-do/conduct-elections/representation-case-rules-effective-april-14-2015.

When feasible, the list shall be filed electronically with the Region and served electronically on the other parties named in this decision. The list may be electronically filed with the Region by using the E-filing system on the Agency's website at www.nlr.gov. Once the website is accessed, click on **E-File Documents**, enter the NLRB Case Number, and follow the detailed instructions.

Failure to comply with the above requirements will be grounds for setting aside the election whenever proper and timely objections are filed. However, the Employer may not object to the failure to file or serve the list within the specified time or in the proper format if it is responsible for the failure.

No party shall use the voter list for purposes other than the representation proceeding, Board proceedings arising from it, and related matters.

D. Posting of Notices of Election

Pursuant to Section 102.67(k) of the Board's Rules, the Employer must post copies of the Notice of Election that will issue and that accompany this Decision in conspicuous places, including all places where notices to employees in the unit found appropriate are customarily posted. The Notice must be posted so all pages of the Notice are simultaneously visible. In addition, if the Employer customarily communicates electronically with some or all of the employees in the unit found appropriate, the Employer must also distribute the Notice of Election electronically to those employees. The Employer must post copies of the Notice at least 3 full working days prior to 12:01 a.m. of the day of the election and copies must remain posted until the end of the election. For purposes of posting, working day means an entire 24-hour period excluding Saturdays, Sundays, and holidays. However, a party shall be estopped from objecting to the nonposting of notices if it is responsible for the nonposting, and likewise shall be estopped from objecting to the nondistribution of notices if it is responsible for the nondistribution. Failure

¹⁵ The Petitioner waived the entirety of its 10-day entitlement to the voter list.

to follow the posting requirements set forth above will be grounds for setting aside the election if proper and timely objections are filed.

RIGHT TO REQUEST REVIEW

Pursuant to Section 102.67 of the Board's Rules and Regulations, a request for review in this case may be filed with the Board at any time following the issuance of this Decision until 14 days after a final disposition of the proceeding by the Regional Director. Accordingly, a party is not precluded from filing a request for review of this decision after the election on the grounds that it did not file a request for review of this Decision prior to the election. The request for review must conform to the requirements of Section 102.67 of the Board's Rules and Regulations.

A request for review may be E-Filed through the Agency's website but may not be filed by facsimile. To E-File the request for review, go to www.nlr.gov, select E-File Documents, enter the NLRB Case Number, and follow the detailed instructions. If not E-Filed, the request for review should be addressed to the Executive Secretary, National Labor Relations Board, 1015 Half Street SE, Washington, DC 20570-0001. A party filing a request for review must serve a copy of the request on the other parties and file a copy with the Regional Director. A certificate of service must be filed with the Board together with the request for review.

Neither the filing of a request for review nor the Board's granting a request for review will stay the election in this matter unless specifically ordered by the Board. If a request for review of a pre-election decision and direction of election is filed within 10 business days after issuance of the decision and if the Board has not already ruled on the request and therefore the issue under review remains unresolved, all ballots will be impounded. Nonetheless, parties retain the right to file a request for review at any subsequent time until 10 business days following final disposition of the proceeding, but without automatic impoundment of ballots.

Signed this 22nd day of March 2021.



THOMAS GOONAN
Regional Director, Region Four
National Labor Relations Board